Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 246.

FREDERICK S. DEITRICK,
RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK,
Petitioner,
v.
THOMAS E. GREANEY,
Respondent.

BRIEF FOR THE RESPONDENT.

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INDEX.

	Page
The opinions of the courts below	1
Statement of the case	1
Summary of argument	5
Argument	6
I. The receiver of a closed national bank may not recover from the maker of an accommodation note given to the bank, at its request, and taken by the bank for the purpose of concealing its ownership of shares of its own stock previously acquired by it in violation of law	6
II. In a suit on an accommodation note given to a national bank, at its request, and taken by the bank for the purpose of concealing its ownership of shares of its own stock previously acquired by it in violation of law, liability of the maker cannot be predicated merely on the fact that he was a director of the bank	13
III. Federal law governs the validity and enforcibility of the note in suit	14
IV. The decision of the Circuit Court of Appeals is in complete accord with the decisions of the Massachusetts courts	16
V. Discussion of argument contained in petitioner's brief	21
Conclusion	24

TABLE OF AUTHORITIES CITED.

Andresen v. Kaercher, 38 F. (2d) 462	11
Auten v. U.S. National Bank, 174 U.S. 125	15
Bishop v. Palmer, 146 Mass. 469	17
Brigham v. Potter, 14 Gray, 522	18
Commissioner of Banks v. Weisberg, 249 Mass. 357	21
Cutler v. Fry, 240 F. 238	10

Page

Deitrick, Receiver, v. Standard Surety & Casualty Co., 303 U.S. 471 9, 14, 16, 22, 23
Erie Railroad Co. v. Tompkins, 304 U.S. 64 15, 16, 22
Federal Reserve Bank of Richmond v. Crothers, 289 Fed. 777 23
Great Barrington Savings Bank v. Day, 288 Mass. 181 17
Holden v. Cosgrove, 12 Gray, 216 18
Hubbell v. Flint, 13 Gray, 277 18
International Bankers of Massachusetts v. Reid, Murdoch & Co., 1937 Mass. Adv. Sh. 415, 8 N.E. (2d) 19 19
International Trust Co. v. Wattendorf, 256 Mass. 323 18, 19
Jennings, Receiver, v. U.S. Fidelity & Guaranty Co., 294 U.S. 216 15
Kennedy v. Welsh, 196 Mass. 592 18
Lyons v. Westwater, 181 Fed. 681; 193 Fed. 817 23
Prudential Trust Co. v. Moore, 245 Mass. 311 18, 19
Quincy Trust Co. v. Woodbury, 1938 Mass. Adv. Sh. 475; 13 N.E. (2d) 377 20, 21
Rankin, Receiver, v. City National Bank, 208 U.S. 541 8, 9, 10, 16, 21, 22, 23
Salem Trust Co. v. Deery, 289 Mass. 431 17, 18
Salter v. Williams, 240 Fed. 130 23
Wolkovisky v. Rapaport, 216 Mass. 48 17
Yates Center National Bank v. Lauber, 240 F. 237 10
Yates Center National Bank v. Schaede, 240 F. 240 11

Revised Statutes of 1873, section 5201 (U.S.C. Title 12, sec. 83) 15
Revised Statutes of 1873, section 5209, as amended (U.S.C. Title 12, sec. 592) 24

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BRIEF FOR THE RESPONDENT.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court was rendered on June 16, 1938 (R. 13-17), and is reported in 23 F. Supp. 758. The opinion of the Circuit Court of Appeals was rendered on March 25, 1939 (R. 77-90), and is reported in 103 F. (2d) 83.

STATEMENT OF THE CASE.

This is a suit in equity brought in the District Court of the United States for the District of Massachusetts by the receiver of an insolvent national bank to recover from the defendant Greaney and others the amount of a stock assessment levied by the Comptroller of the Currency upon shareholders of the Boston-Continental National Bank, and to recover from the defendant Greaney and another on a promissory note signed by the defendant Greaney.

The defendant Greaney, in his answer (R. 7-10), admitted the execution of the notes and transfers of stock described in the plaintiff's bill, but denied that he or Karnow ever became the owners of said stock, and alleged that said transactions were effected at the request of the bank and for its accommodation, that the bank at all times owned the stock, that it was never intended that any of the defendants should become the owners of said stock, and that the successive transfers to Greaney, Karnow and Mahoney were made to secure the maker of the accommodation note or notes held by the bank.

At the trial of the case in the District Court the following facts were found:

Early in 1930 the Boston National Bank, in violation of the National Banking Act, became the owner of 190 shares of its own capital stock. In order to conceal this fact, the bank, acting through one Ulin, its president, induced the defendant Karnow to execute and deliver to the bank for its accommodation his note in the sum of $23,500. Karnow's note was discounted, the proceeds turned over by Karnow to the defendant Greaney, who at that time was a director of the bank, and Greaney in turn paid the money over to the bank. The shares of stock were thereupon transferred upon the books of the bank to Greaney (R. 13, 14).

From time to time Karnow was induced to renew the note given by him to the bank, and shortly after the first renewal he had the stock standing in Greaney's name transferred on the bank's records from Greaney's name to his own and took actual possession of the certificates (R. 14).

In December of 1930 the Boston National Bank was consolidated with the Continental National Bank under the name Boston-Continental National Bank, and the 190 shares of Boston National Bank stock standing in the name of Karnow became convertible into 684 shares of stock of

the consolidated bank, with a par value of twenty dollars ($20) per share, and were so converted. Prior to the consolidation and conversion of the stock, the Boston National Bank had agreed to sell the 190 shares of its own stock held by Karnow to two officers of the Continental National Bank, named Ragan and Balter, at one hundred fifty dollars ($150) a share, and took a series of notes from the purchasers in payment. Three of the notes, totalling twenty-four thousand dollars ($24,000), were delivered to Greaney with instructions to obtain from Karnow shares of stock as paid for by the payment of said notes (R. 14).

In March of 1931 the first Ragan and Balter note, in the amount of nine thousand five hundred dollars ($9500), was paid. Pursuant to the aforesaid instructions, Karnow released 222.8 shares of stock of the consolidated bank for delivery and transfer to the purchasers, and Karnow was credited on the bank's books with the payment of nine thousand five hundred dollars ($9500) on account of his note (R. 14, 15).

In the early part of May, 1931, at the insistence of Karnow, the consolidated bank agreed to deliver up Karnow's note, at the same time inducing the defendant Greaney to substitute his note to the bank in the sum of fourteen thousand five hundred fifty-three dollars and sixty-six cents ($14,553.66), which at that time represented the then unpaid balance of the Karnow note appearing on the bank's books. At or about the same time the stock held by Karnow was surrendered and put in the name of the defendant Mahoney without his knowledge or consent (R. 15).

In December of 1931 the consolidated bank was closed and a receiver appointed, and on July 11, 1932, an assessment was made by the Comptroller against all stockholders of said bank equal to the par value of their stock, but the assessment upon the 457.2 shares standing in the name of Mahoney was never paid (R. 15).

On June 16, 1938, the court filed an opinion (R. 13-17) wherein certain findings of fact and rulings were made pursuant to which a final decree was entered on June 30, 1938 (R. 12), dismissing the bill as against the defendants Karnow and Mahoney, adjudging the defendant Greaney liable upon a stock assessment in the amount of $9144 with interest as the owner of 457.2 shares of stock standing in the name of the defendant Mahoney, and adjudging him liable to the plaintiff in the sum of $14,553.66, the amount of the promissory note held by the bank, together with interest.

Thereafter, on September 28, 1938, the defendant Greaney appealed to the Circuit Court of Appeals for the First Circuit from the final decree entered on June 30, 1938 (R. 17).

After argument and hearing, the Circuit Court of Appeals on March 25, 1939, rendered an opinion (R. 77-90), and on the same day entered a decree (R. 90) in which it reversed the decree of the District Court in so far as it held the defendant Greaney liable on his note for fourteen thousand five hundred fifty-three dollars and sixty-six cents ($14,553.66), ordered the suit dismissed as to such liability, and affirmed the decree of the District Court in so far as it established the defendant Greaney's liability in the amount of nine thousand one hundred forty-four dollars ($9144), together with interest, as an assessment on 457.2 shares of stock of the Boston-Continental National Bank (R. 90-91).

Thereafter the plaintiff, seeking a review of the decree of the Circuit Court of Appeals, filed a petition for a writ of certiorari with this Honorable Court. The defendant Greaney filed a cross-petition for a writ of certiorari, being docket No. 247, seeking a review of that part of the decree of the Circuit Court of Appeals which adjudged him liable for a stock assessment. This court, on October 9, 1939, granted the plaintiff's petition for a writ of certiorari (R. 93).

Summary of Argument.

It is submitted that the evidence and the express findings of fact of the District Court disclose that the giving of the note and the bank's apparent relinquishment of the stock constituted only a colorable transaction, and were merely part of a scheme to conceal from the bank examiner the bank's illegal ownership of the stock. The undisputed testimony at the trial of the cause and the findings of the District Court establish that the bank never actually parted with its beneficial ownership of the shares of stock, and that none of the parties intended that the promissory note be considered an actual obligation.

It is respectfully submitted that the portion of the opinion of the Circuit Court of Appeals (R. 77-84) which exempts Greaney from liability on his promissory note is in complete accord with the principles set forth in established decisions to the effect that the receiver of a closed national bank may not recover from the maker of an illegal accommodation note given to the bank at its request and taken by the bank for the purpose of concealing its ownership of shares of its own stock previously acquired by it in violation of the National Banking Act.

In the plaintiff's attempt to hold Greaney liable on his note, great weight is placed upon the fact that Greaney was a director in the bank of which the plaintiff is the receiver. Such argument by the plaintiff might be sound if this were a suit by a receiver of a close national bank on behalf of its creditors to impose liability on a director for a breach of duty to depositors, but the pleadings do not state such a case. This is merely a suit by a receiver to recover on a note as an asset of the bank. In such a proceeding the fact that the maker of the note was also a director of the payee cannot deprive the maker of his agreement with the payee that the note would not be enforced against him. The defendant is not estopped to assert such

a defense since all the requisites of an estoppel are lacking in the instant case. Particular attention should be directed to the fact that the bill in equity does not allege, nor is there any evidence or finding, that the giving of the note in suit in any way damaged the bank or its depositors or deceived the bank examiner. The evidence and findings in the case clearly establish that the bank acquired the shares of stock in question considerably before the defendant gave the note in question. The bank gave up nothing and acquired nothing when it took the note in suit. The findings of the District Court clearly show that this note was taken, not to divest the bank of its ownership of the stock, but to conceal its continued ownership. *The giving of the note under such circumstances did not increase or decrease the assets of the bank—the allowance of a recovery on the note would result in a windfall to the bank.*

Despite the contentions of the petitioner, it is clear that the validity and enforcibility of the note in suit is to be governed by Federal court rules of decisions and not by Massachusetts law. Furthermore, the decision of the Circuit Court of Appeals does not conflict with decisions of the Massachusetts courts.

Argument.

I.

THE RECEIVER OF A CLOSED NATIONAL BANK MAY NOT RECOVER FROM THE MAKER OF AN ACCOMMODATION NOTE GIVEN TO THE BANK, AT ITS REQUEST, AND TAKEN BY THE BANK FOR THE PURPOSE OF CONCEALING ITS OWNERSHIP OF SHARES OF ITS OWN STOCK PREVIOUSLY ACQUIRED BY IT IN VIOLATION OF LAW.

The Circuit Court of Appeals followed the well-established decisions of this Honorable Court and of Federal courts of inferior jurisdiction when it reversed that part of the decree of the District Court which adjudged the de-

fendant Greaney liable on his note. In this respect the District Court made the following basic finding:

> "Early in 1930, the Boston found itself in a position where it was the owner of 190 shares of its own stock. This ownership came about by the purchase of the stock from one of its directors who threatened to dump it on the open market. Fearing the result of such action, the bank took the stock over, and carried it as a cash item. Such ownership was in violation of the National Banking Act. 12 U.S.C.A. Sec. 83. In order to conceal this illegal ownership, a scheme was devised whereby the note of some third person would be carried on the bank's books as a receivable, and the stock would be carried on the records either in the name of that third person, or in someone's name other than the bank" (R. 13).

This finding clearly establishes that the acts of the parties in giving the promissory note and in registering the stock in the name of persons other than the bank were entirely fictitious and of no legal effect. The net result of these transactions was as if the shares of stock had never been transferred out of the bank's name.

All the cases bearing upon the liability of the maker of a promissory note given to a national bank for its accommodation, and to enable it to conceal from the bank examiner its true financial condition, establish the following propositions:

(1) The maker may set up lack of consideration as a defense;

(2) Participation by the maker in such an illegal transaction does not aid the bank's receiver, but precludes recovery by him;

(3) The receiver of the bank is in no better position than the bank itself would have been.

In *Rankin, Receiver*, v. *City National Bank*, 208 U.S. 541, this Honorable Court rendered a decision involving the principles under discussion in the case at bar. In that case the president of a bank arranged with the defendant bank (called the City Bank) to discount his individual note and deposit the proceeds to a special account in the name of his bank (called the Guthrie Bank) under an arrangement whereby these funds were not to be drawn against but were to remain with the City Bank until the note was paid. The purpose of this transaction was to effect a reduction of certain loans to which the examiner had objected as excessive. The president gave his bank a check on the City Bank, the amount of which was credited to his personal account, and on the same day he gave his bank a check on his personal account, which was credited to bills receivable, and the objectionable notes were taken out of the bank's assets. The receiver of the Guthrie Bank sued to recover the deposit to its credit which the City Bank had offset against the note held by it on the day that the Guthrie Bank closed. It was agreed by the parties that the transaction between the banks was not illegal, but in affirming a decision in favor of the defendant bank, the court enunciated certain well-defined principles in the following language:

(P. 545) "* * * the whole business from beginning to end, was and was intended to be a mere juggle with books and paper to deceive the bank examiner. The City Bank never received anything from the Guthrie Bank, the Guthrie Bank never parted with anything to the City Bank, or with anything for the loss of which the City Bank is responsible, if it parted with anything at all."

(P. 546) "As between the banks no one got any money, and the only benefit of the loan in fact or contemplation was a swindle upon the bank examiner * * *.

If the Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank * * *."

(P. 547) "In view of the statement of counsel, at the argument * * * that they did not contend that the contract was illegal * * * and in view of the possibility that the facts were found as they were with that agreement in view, we shall not consider that aspect of the case. *It would not help the plaintiff. McMullen* v. *Hoffman*, 174 U.S. 639." (Italics ours.)

The decision in the *Rankin* case has quite recently been approved and reaffirmed by this Honorable Court in *Deitrick, Receiver,* v. *Standard Surety & Casualty Co.*, 303 U.S. 471, in which case the issues were identical with those in the case at bar. Actions were brought by the receiver of a closed bank on surety bonds given to the bank to secure the payment of certain discounted notes and the surety company brought a bill in equity to cancel the bonds. The surety company set up that the bonds had been obtained from its agent on the representation by the bank that it would not hold the surety company liable and merely wanted to be able to show the bond in case the examiner should ask for collateral.

Decisions in favor of the surety company in the District Court were affirmed by the Circuit Court of Appeals, which approved without reservation the same contentions advanced by the defendant herein, that the plaintiff as receiver is in no better position than the bank and indeed is precluded from recovery by its participation in the illegal transaction.

The Circuit Court in its opinion, found in 90 F. (2d) 862, said:

(P. 865) "It is clear from the pleadings that the receiver seeks to recover on these bonds as assets of the bank. In such an action he stands no better than the

bank itself. All defenses open against the bank in such a case are open against the receiver, and he is chargeable with knowledge of all the facts known to the bank affecting the character of the claim. While there are decisions in the state courts to the contrary, the federal courts sustain this position [citing many cases, including *Cutler* v. *Fry*, 240 F. 238; *Yates Center National Bank* v. *Schaede*, 240 F. 240; aff'd 240 F. 241; *Bank* v. *Lauber*, 240 F. 237; *Rankin* v. *City Nat. Bank*, 208 U.S. 541].

"If therefore the contract with the surety company was illegal as to the bank * * * a recovery could not be had by the receiver."

This Honorable Court in affirming the decision of the Circuit Court of Appeals discussed the *Rankin* case and with reference thereto said:

(P. 480) "We adhere to the doctrine there approved and regard it as decisive of the present cause."

In *Yates Center National Bank* v. *Lauber*, 240 F. 237, pursuant to an arrangement to help the officers conceal the financial condition of the bank, the bank turned over certain worthless notes to the defendant for his note, and agreed that it would at any time accept them in satisfaction of his note. The court refused to hold the defendant liable, saying:

(P. 238) "* * * the illegality of the entire matter so clearly appears as to prevent a court of justice from affording any relief based thereon."

In *Cutler* v. *Fry*, 240 F. 238, the defendant was induced to give his note in exchange for the president's note, to

help conceal defalcations of the president, under an agreement that the bank would at any time take the president's note in payment of the defendant's note. The court held that lack of consideration was a defense, and said:

> (P. 239) "However, the rights of the receiver of the bank to recover on the note in question rise no higher than the rights of the bank had insolvency not intervened * * * in the hands of the original payee or its receiver, as is this case, both the note and the contemporaneous agreement constituted the entire contract between the parties and, when the agreement thus formed is presented, the illegality of the whole matter so clearly appears the court will leave the parties where it finds them by refusing all relief. *Rankin* v. *City National Bank* 208 U.S. 541; *McMullen* v. *Hoffman* 174 U.S. 639."

In *Yates Center National Bank* v. *Schaede*, 240 F. 240 (affirmed without opinion by the Circuit Court of Appeals for the Eighth Circuit, 240 F. 241), the court refused to enforce a note given to a bank without consideration to conceal the defalcations of its president, saying:

> (P. 240) "Not only is this defense (want of consideration) made out but it further appears that the whole transaction from the making of the original note to the renewal in controversy, was without consideration and in pursuance of the illegal and criminal design of the president of the bank. Such state of facts public policy and good morals alike condemn, and courts refuse to enforce."

In *Andresen* v. *Kaercher*, 38 F. (2d) 462 (C.C.A. 8th), the bank had a claim against the estate of one Kaercher and entered into an agreement with the defendants whereby the

defendants deeded certain real estate to the bank (which was to be sold as soon as possible) and gave to the bank accommodation notes so that the bank might be able to show them as assets until the real estate should be sold. The trial court directed a verdict for the defendants, and this decision was affirmed on appeal, the court stating:

> (P. 464) "The receiver of an insolvent bank stands in no better position than the bank stood as a going concern. *Rankin* v. *City National Bank* 208 U.S. 541, *Petersen* v. *Tillinghast* 192 F. 287. * * * it cannot be contended that the Citizens National Bank while a going concern could have maintained actions against them to recover on the notes. *Cherry* v. *City National Bank* 144 F. 589, 591."

The court answered the argument that the defendants had been guilty of a concerted attempt to deceive the Comptroller of the Currency, in the following language:

> (P. 464) "But, be this as it may, the result is not affected because the court will not lend its assistance in any way towards carrying out an illegal contract, nor will it enforce any alleged rights directly springing from such a contract. *McMullen* v. *Hoffman*, 174 U.S. 639. In this view the bank itself could not have collected, nor is the receiver more advantageously situated * * *."

The foregoing authorities, it is submitted, establish that, where a note is given to a bank for its accommodation and to conceal its true financial condition from the Comptroller's office, the maker may set up the defense of lack of consideration as against the bank's receiver, and that, even at the instance of the receiver, the courts will not enforce a note given as part of such an illegal transaction. The bank's

plunge into insolvency and receivership does not absolve it of the taint of illegality, which persists to bar recovery by the receiver. His rights are in no way superior to the rights of the bank, and, that being so, the time-honored principle denying enforcement of illegal obligations must obtain.

II.

IN A SUIT ON AN ACCOMMODATION NOTE GIVEN TO A NATIONAL BANK, AT ITS REQUEST, AND TAKEN BY THE BANK FOR THE PURPOSE OF CONCEALING ITS OWNERSHIP OF SHARES OF ITS OWN STOCK PREVIOUSLY ACQUIRED BY IT IN VIOLATION OF LAW, LIABILITY OF THE MAKER CANNOT BE PREDICATED MERELY ON THE FACT THAT HE WAS A DIRECTOR OF THE BANK.

As shown above, it is clear that the note transactions in question were fictitious, without consideration, and constituted an illegal agreement, so that no recovery on the notes can be had by the bank or its receiver. The fact that the maker of the note in suit was a director of the bank cannot alter the situation. To be sure, he owes duties to the bank which another might not owe, but he is not being sued for dereliction of duty—he is being sued as the maker of a note, and there is no principle or authority which would supply consideration when none existed, which would exculpate the bank *in pari delicto* or which would give to the receiver rights superior to those enjoyed by the bank, merely because he was a director.

Furthermore, the receiver here is suing to recover on the note as an asset of the bank. In such a suit the receiver cannot recover on account of any rights derived through creditors of the bank and arising out of damage to them. The pleadings do not allege deception of or any damage to creditors and depositors, nor, in fact, is there any allegation that the bank examiner was deceived. Precisely the

same question was in issue in the case of *Deitrick, Receiver, v. Standard Surety & Casualty Co.*, discussed in detail above, where the court said:

> (P. 480) "An examination of the pleadings makes it quite clear that the Receiver undertook to set up rights acquired by the insolvent bank through duly executed contracts between it and the Surety Company. He makes no suggestion of a purpose attributable to the company to mislead creditors or others; makes no allegations of damage except that sustained by the bank. He sets up no facts which would render unconscionable a denial of liability upon the bond because of the agent's fraud, obviously induced by the president of the bank. In this state of the pleadings the Receiver may not have judgment; he cannot rely on something not complained of, nor can he have damages because of supposed deceptions which the pleadings fail to suggest."

It is submitted that the decision of the Circuit Court of Appeals denying recovery on the note was in complete accord with the well-established decisions of this Honorable Court, and that the District Court, in addition to departing from the decisions of this Honorable Court, erred in enforcing a right not asserted and not litigated.

III.

FEDERAL LAW GOVERNS THE VALIDITY AND ENFORCIBILITY OF THE NOTE IN SUIT.

The defendant's liability on his note given to aid the bank in concealing its continued illegal ownership of shares of its own stock must be determined by Federal law. The validity of the note in question arises under the Acts of Congress, since it was given to conceal the continued own-

ership by the bank of its own shares of stock held in violation of section 5201 of Rev. Stat. of 1873 (U.S.C. Title 12, sec. 83). The petitioner relies on the case of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, to support his contention that Massachusetts law governs this question. In that case the court said:

> (P. 78) "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state."

It is submitted that the case at bar comes within the foregoing exception as a case arising under the Acts of Congress. An action by or against a receiver of a national bank, appointed under the Banking Act, is an action arising under the laws of the United States because an Act of Congress creates his office, grants his rights and powers and imposes his duties. In the absence of this Act there would be no such receiver and no suits by or against him could arise. Every action by or against him necessarily involves the exercise of some of his rights, or the proper discharge of some of his duties, and invokes a consideration of the proper construction and effect of the laws of the United States from which he derives them. *Anten* v. *U.S. National Bank*, 174 U.S. 125.

The basic question in the case at bar is whether or not the note in suit is such an asset of a national bank as will entitle its receiver to maintain a suit thereon. Certainly such a question should be uniformly decided so that the right of a national bank or its receiver to enforce such a note should not vary according to the law of each State.

In *Jennings, Receiver*, v. *U.S. Fidelity & Guaranty Co.*, 294 U.S. 216, this court had under consideration provisions of the Indiana code whereby an owner of negotiable paper given to a bank for collection, and collected but not paid over, became a preferred claimant. The court, in dealing

with the liquidation of an insolvent national bank, held that the local law was contrary to the system of equal distribution established by Federal law and therefore was not applicable to the liquidation of a national bank.

The decision in *Deitrick, Receiver*, v. *Standard Surety & Casualty Co.* (*supra*) may be used as authority for the proposition that the validity and enforcibility of an obligation deemed to be an asset of a closed national bank is not governed by State law but comes within the above-quoted exception to the general rule established by *Erie Railroad Co.* v. *Tompkins* (*supra*). The *Tompkins* case was argued on January 31, 1938, and decided on April 25, 1938. The *Deitrick* case was argued on March 7 and 8, 1938, and decided on March 28, 1938, at a time when this court had the *Tompkins* case under consideration. After the decision in the *Tompkins* case, this Honorable Court, on May 2, 1938, denied a petition for a rehearing of the *Deitrick* case. It should be noted that the decision in the *Deitrick* case follows and reaffirms the rule of law established in the *Rankin* case discussed at length above, and that neither case purports to follow the rules of decision of any but the Federal courts.

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN COMPLETE ACCORD WITH THE DECISIONS OF THE MASSACHUSETTS COURTS.

Even if it be assumed that the questions of law raised in the case at bar are to be governed by Massachusetts decisions rather than by the decisions of the Federal courts, it is submitted that the decision of the Circuit Court of Appeals denying recovery against Greaney on the note in question is in complete accord with well-established decisions of the Massachusetts Supreme Judicial Court.

There can be no doubt that the note in suit was given only in substitution for the unenforcible Karnow note formerly held by the bank, that both notes were given for the accommodation of the bank, not in substitution for an asset of the bank, and for the sole purpose of concealing the bank's continued illegal ownership of its own shares of stock. The Massachusetts court has uniformly held that a promissory note made for the accommodation of a bank is without consideration and unenforcible.

> *Salem Trust Co.* v. *Deery*, 289 Mass. 431.
> *Great Barrington Savings Bank* v. *Day*, 288 Mass. 181.

In addition to the circumstance that the notes in question were given for the accommodation of the bank, it is clear that they were tainted with illegality because of the purpose to deceive the bank examiner. The Massachusetts court will not entertain an action to enforce a note given as part of a transaction illegal at common law or by statute, even where the note is supported by consideration.

In the case of *Wolkovisky* v. *Rapaport*, 216 Mass. 48, the court held invalid an agreement based upon a collusive divorce, and said, at page 51:

> "The aid of a court of law or of equity cannot be invoked to enforce a claim the very statement of which discloses an illegal purpose as its foundation. The law leaves the parties to unlawful contracts where they have placed themselves."

In the case of *Bishop* v. *Palmer*, 146 Mass. 469, the plaintiff sued for the balance of the purchase price of a business sold to the defendant. As part of the consideration the plaintiff made an agreement in restraint of trade. The court held that the entire purchase and sale constituted

an illegal agreement at common law, and that, since the entire consideration was not severable, the plaintiff could not maintain the action. It is the law of Massachusetts that promissory notes given for liquor sold in violation of statute are unenforcible.

Brigham v. *Potter*, 14 Gray, 522.
Hubbell v. *Flint*, 13 Gray, 277.
Holden v. *Cosgrove*, 12 Gray, 216.

In the case at bar the third prayer of the bill of complaint as amended (R. 4) seeks to have the defendant Greaney and the defendant Karnow adjudged liable on the promissory note in suit. The District Court found that Karnow gave his note only for the accommodation of the bank and dismissed the bill of complaint as against him, from which the plaintiff has taken no appeal. The District Court further found that Greaney gave his note in substitution of the Karnow note with the express agreement that Greaney was to stand in the same position as Karnow (R. 15). It is the law of Massachusetts that a note given in renewal of or in substitution for an illegal or accommodation note is without consideration and unenforcible.

Kennedy v. *Welsh*, 196 Mass. 592.
Salem Trust Co. v. *Deery, supra.*

The plaintiff relies upon the cases of *Prudential Trust Co.* v. *Moore*, 245 Mass. 311, and *International Trust Co.* v. *Wattendorf*, 256 Mass. 323, as authority for establishing the liability of Greaney on the note in suit, but those cases are not in point. The circumstances in each of them are entirely different from those found in the case at bar.

In the *Prudential Trust Co.* case the court bases its decision on the fact that there was actual consideration for the note in suit since it was given in substitution for other

notes of a borrower which were valid and enforcible. In the *International Trust Co.* case the court likewise bases its decision upon the fact that the note in question was not an accommodation note and was supported by actual consideration. In both decisions the court bolsters its conclusions by a theory of estoppel, since in each case there was an actual change of position by the bank as a result of its taking the notes in suit. In the case at bar there can be no doubt that the note in suit was without consideration, was a note given for the accommodation of the bank, that the bank gave up no enforcible asset and in no way changed its position. There can be no estoppel under these circumstances.

In the case of *International Bankers of Massachusetts* v. *Reid, Murdoch & Co.*, 1937 Mass. Adv. Sh. 415, 8 N.E. (2d) 19, the court said, at page 419:

> "The essential factors giving rise to an estoppel are . . . (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made — (2) An act or omission resulting from the representation, whether actual or by conduct by the person to whom the representation is made (3) Detriment to such person as a consequence of the act or omission."

It is clear that the Massachusetts court in the *Prudential Trust Co.* case and in the *International Trust Co.* case, although it found consideration, also established liability by reason of an estoppel due to the change of position suffered by the bank in each instance when it relinquished an enforcible asset.

The decisions in those cases have since been distinguished by the most recent decision of the Massachusetts Supreme

Judicial Court. In the case of *Quincy Trust Co.* v. *Woodbury*, 1938 Mass. Adv. Sh. 475, 13 N.E. (2d) 377, the plaintiff bank induced the defendants to endorse a promissory note for its accommodation upon the representations that the defendants would never be called upon to pay the note and that the endorsements were sought in order that the bank examiner might not otherwise object to the note in question. The circumstances in that case are strikingly parallel to those in the case at bar. In both cases the obligations sought to be enforced were given for the accommodation of the bank without any consideration to the party sought to be charged and with the express agreement that the obligations would not be enforced; in both cases the obligations in question were given to conceal the true condition of the bank from a bank examiner; in neither case was there any detriment to the bank nor did the bank change its position financially or otherwise, and it does not appear that the creditors of either bank were injured or misled. The decision of the Massachusetts court in the *Quincy Trust Co.* case shows clearly that under these circumstances no liability exists in the absence of facts creating an estoppel.

In denying recovery to the plaintiff bank, the court held, at page 477:

> "The plaintiff contends, however, that the defendants cannot make this defence to the renewal note, because their endorsements of the original note were intended to give the plaintiff an apparent soundness, the reality of which the defendants cannot be permitted to deny or impair. It is true that circumstances somewhat like those in the present case might create an estoppel against such a defence. *Prudential Trust Co.* v. *Moore*, 245 Mass. 311, 316. *International Trust Co.* v. *Wattendorf*, 256 Mass. 323. *Schmid* v. *Haines*, 115 N.J.L. 271, 274. But the present record contains nothing to show an estoppel. It does not appear that the

impending visit of the bank examiners ever took place, much less that the notes in question had any actual effect upon the situation of creditors of the plaintiff."

The authority of the decision in *Quincy Trust Co.* v. *Woodbury, supra,* is not altered by the argument that it did not deal with a suit by a receiver of a closed bank. The Massachusetts court follows the rule established by this Honorable Court in *Rankin, Receiver,* v. *City National Bank, supra,* to the effect that a receiver or the commissioner of banks in possession of a closed bank acquires no greater rights than the bank itself had.

In the case of *Commissioner of Banks* v. *Weisberg,* 249 Mass. 357, the court says, at page 360:

> "The commissioner of banks has no other or greater rights in the premises than those of the bank which he is liquidating."

It is submitted that, even if this court should determine that Massachusetts law governs the case at bar, the defendant Greaney would not be liable on the note in suit, and that the decision of the Circuit Court of Appeals was not contrary to the decisions of the Massachusetts Supreme Judicial Court.

V.

Discussion of argument contained in petitioner's brief.

It is most important that this court recognize that the petitioner makes no contention that the bank rectified its position by disposing of its own stock illegally acquired. The first paragraph commencing on page 8 of the petitioner's brief discloses that the petitioner and the respondent agree that the purpose and effect of the Karnow and Greaney notes was to conceal the bank's continued owner-

ship of the shares of stock and not to remove the same from the bank's ownership.

The argument of the petitioner whereby he seeks to have this court depart from well-established principles, on the ground that the policy of the National Banking Act requires imposition of liability, is not founded on facts proved at the trial or found by the District Court—there is no evidence or finding that the bank examiner was deceived, or that any depositor of the bank was injured. Furthermore, Greaney cannot be held liable in this action because he may have subjected himself to a criminal liability or to being charged civilly by reason of a fiduciary duty he may have owed as a director of the bank.

It is interesting to note that the petitioner is in accord with the respondent's contention that the situation presented by the instant suit is to be "governed by" an Act of Congress, rather than by local law, so as to come within the exception to the general rule established in *Erie Railroad Co.* v. *Tompkins, supra.*

The petitioner is obviously troubled by the decision of this court in *Rankin* v. *City National Bank, supra,* and rightly so. That case was reaffirmed by the recent decision of this court in *Deitrick* v. *Standard Surety Company, supra.* The grounds of distinction argued by the petitioner are not convincing. The instant situation is not only controlled by the broader basis of the decision in the *Deitrick* case, but an examination of the pleadings in the case at bar will reveal the same defects that contributed to the decision of this court in the *Deitrick* case.

In section (C) of division II of his brief the petitioner cites cases holding that in some instances a receiver of an insolvent national bank may have rights superior to those of the bank. Such decisions do not involve situations where the receiver, as in the case at bar, is merely attempting to reduce to judgment a note held by the bank. This court

does not consider those decisions to be in conflict with the decision in the *Rankin* case, since it reaffirms the *Rankin* case in the *Deitrick* case, decided subsequently to the decisions relied on by the petitioner. The petitioner is unable to cite any decision of this court wherein a receiver, in suing to enforce an illegal executory agreement or note, has been given rights superior to those of the bank.

The authority of the cases cited by the respondent is in no way diminished by the fact that the respondent was a director of the bank. Although the petitioner's brief contains decisions in which some courts seem to impose liability because a defendant was a director, all of those cases are easily distinguishable. In each case cited by the petitioner there was real consideration—such as a note given in substitution for an asset of the bank—or all the elements of a real estoppel were found. The petitioner relies upon the decisions in *Lyons* v. *Westwater* (C.C.A. 3d, 1910), 181 Fed. 681, and (1912) 193 Fed. 817. The authority of those cases has been limited to enforcing liability to complete a contract of subscription—*Salter* v. *Williams*, 240 Fed. 130 (C.C.A. 3d)—and imposing liability upon the maker of an accommodation note given to replace an asset of the bank—*Federal Reserve Bank of Richmond* v. *Crothers*, 289 Fed. 777 (C.C.A. 4th). The respondent is confident that this court will not adopt the spurious reasoning of those decisions, which substitute for consideration an estoppel alleged to be required by public policy. If public policy in such cases means that the national banking structure would be weakened by refusing to allow the receiver of a closed national bank to recover on an illegal accommodation note, not given in substitution for an asset of the bank, the enforcibility of such a note should not depend on the maker being a director of the payee bank.

It is submitted that public policy will close our courts to a party *in pari delicto* seeking to enforce an illegal agree-

ment, but that it does not operate to deprive a party of the benefit of his agreement with respect to the enforcibility of his obligation. The integrity of the national banking structure is fully protected by section 5209 of Revised Statutes of 1873 as amended (U.S.C. Title 12, sec. 592), imposing a criminal liability on any person who aids in deceiving a bank examiner, and by the civil responsibility of a person causing damage by deception. If the petitioner has misconceived his remedy against Greaney, the aid of this court should not be invoked to correct such a mistake on a tenuous plea of public policy.

Conclusion.

The decree of the Circuit Court of Appeals denying the petitioner the right to enforce a note in suit was in complete accord with the decisions of this Honorable Court. Although Massachusetts law does not govern the question in issue, the decision of a Circuit Court of Appeals does not conflict with any decisions of the Massachusetts courts.

Wherefore the respondent respectfully requests that the decision of the Circuit Court of Appeals be affirmed.

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